

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0577
Withholding and Sales Tax
For Years 1990-1994

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ISSUE

I. Responsible Officer Liability – Duty to Remit Withholding and Sales Taxes

Authority: Ind. Code § 6-2.5-9-3;
Ind. Code § 6-3-4-8;
Ind. Code § 6-8.1-5-1;
Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

The taxpayer protests the assessment of withholding and sales tax liability as a responsible officer.

STATEMENT OF FACTS

The taxpayer is the President of an Indiana company that did not submit sufficient withholding and retail sales taxes to the Department of Revenue for the period 1990 through 1994. The Department assessed liability for the taxes to the taxpayer. The taxpayer is protesting the determination that he is liable as a responsible officer for the payment of the taxes based primarily on the argument that tax exempt sales were not deducted and that the sales tax was not computed correctly. At the administrative hearing on this matter, the taxpayer did not submit any evidence showing that he was not responsible for the taxes. The taxpayer asked for, and was given, an additional four weeks to submit such evidence. The evidence submitted consisted of a number of sales receipts, many of which showed sales to tax-exempt organizations.

I. Responsible Officer Liability – Duty to Remit Withholding and Sales Taxes

DISCUSSION

The taxpayer argues that he is not liable for the withholding and sales taxes he was assessed with. He maintains that accounting errors were made and that as a result, tax exempt sales were not deducted from his gross receipts and the sales tax was not computed correctly. The information contained in the taxpayer's Department of Revenue file shows that receipts from tax exempt sales were deducted from the gross receipts on the Indiana Sales and Use Tax Vouchers. In addition, the five percent (5%) retail sales tax was properly applied.

"The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The taxpayer has failed to submit any evidence to show that he was not a responsible officer and thus, he is liable for the taxes due.

Ind. Code § 6-3-4-8(e) states in relevant part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in IC 6-3.

Additionally, Ind. Code § 6-3-4-8(f) states in part:

In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

The Indiana Supreme Court has identified three factors to consider when determining liability as a responsible officer: 1.) the person's position within the structure of the corporation; 2.) the authority of the person as established by the articles of incorporation, bylaws, or the person's employment contract; and 3.) whether the person actually exercised control over the corporation's finances. Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). In the instant case, the taxpayer admits that he was President of the company during the time period when the withholding and sales taxes were due and that he signed all the Sales and Use Tax Vouchers. He also signed and executed the Indiana Department of Revenue Power of Attorney Form as President on behalf of his company. The taxpayer is a responsible officer as defined by the Court in Safayan and is, therefore, personally liable for the payment of the withholding taxes.

Personal liability of a responsible officer for payment of sales tax is outlined in the Indiana Code:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member

of a corporate or partnership retail merchant; and
(2) has a duty to remit state gross retail or use taxes to the department of revenue;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

Ind. Code § 6-2.5-9-3.

“The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax.” Safayan, 654 N.E.2d at 273. The taxpayer is, therefore, a responsible officer and is personally liable for payment of both the withholding and the sales taxes due.

FINDING

The taxpayer’s protest is denied.